2008

Travis James Perkins v. State of Utah : Reply Brief

Utah Court of Appeals

Kenneth A. Bronston; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.
Blake A. Nakamura; Sara Pfrommer; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

TRAVIS JAMES PERKINS Appellant vs. STATE OF UTAH, Appellee.	Case No. 20080961

REPLY BRIEF OF APPELLANT TRAVIS JAMES PERKINS

Blake A. Nakamura
142 East 200 South, Suite 312
Salt Lake City, UT 84111

and

Sara Pfrommer
2663 Little Kate Road
Park City, UT 84060

Counsel for Appellant

KENNETH A. BRONSTEON
Assistant Attorney General
MARK L. SHURTLEFF
Utah Attorney General
1600 East 300 South, 6th Floor
Salt Lake City, UT 84114-0854

Counsel for Appellee

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KENNETH A. BRONSTEON
Assistant Attorney General
MARK L. SHURTLEFF
Utah Attorney General
1600 East 300 South, 6th Floor
Salt Lake City, UT 84114-0854

Counsel for Appellee

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In his Opening Brief, Travis Perkins asked this Court to overturn his conviction for driving under the influence of alcohol. His request was based on two contentions: 1) the police had violated the curtilage of his living space to obtain evidence against him, without either a warrant or sufficient evidence to support a search and 2) that the police officer had violated his constitutional rights when he compelled Perkins to come to the rear sliding glass door of his condominium, even after Perkins had clearly indicated that he did not wish to talk to the police.

The existence of either of these circumstances is sufficient to render the evidence obtained from the improper questioning inadmissible. In its answering brief, the State fails to establish the propriety of either action. The evidence obtained after Perkins opened his sliding glass door after having been ordered to do so by the police officer should be suppressed, and since it is the only evidence of Perkin's guilt, his conviction should be overturned.

A. The State Makes No Meaningful Response to the Contention that A Rear Patio That Cannot Be Viewed Or Accessed From Any Public Place, Constitutes the Curtilage of Perkin's Residence

In its answering brief, the State concedes that the authority on which Perkins relied to support his claim that the police had violated the curtilage of his house is the appropriate standard for determining the issue. The State contends that factors set forth in the United States Supreme Court case of *United States v. Dunn*, 480 U.S. 294, 107

S.Ct. 1134, 1139 (1987) do not support the conclusion that a rear patio, directly adjacent to the sliding glass rear door of a condominium, constitutes "curtilage."

The State relies on the fact that there were no physical barriers or fences barring access to the space, but does not deny that there was no public access to the patio and that it could only be reached by walking across non-public space, through unplowed snow, uphill. The State offered no evidence to show that the patio was easily accessible or that people routinely approached Perkin's home via its rear entrance.

Perkins submits that the location of the patio, including the fact that it was not readily accessible by public walkways or other common areas, supports the conclusion that it was "enclosed by the terrain" and therefore constitutes the curtilage of his home. In a location where the natural beauty of the surroundings and the expansiveness of the mountain views form a large part of a homeowner's enjoyment of his residence, Perkins submits that he should not be required to build a fence or otherwise block his view in order to preserve the right to privacy that is otherwise afforded by the physical location of his window.

The one new case cited by the State, *State v. Peck,* 143 Wis 2d 634, 422 N.W.2d 160 (Wis. App. 1998) sheds no relevant light on the issues in this case. In *Peck,* the Wisconsin court upheld the arrest of the defendant after the police observed marijuana growing in several fields that were distant from the house in which the defendant resided. Although some of the marijuana that was seized was within the curtilage, in fact the police testified that they originally observed the marijuana from a town road, using

binoculars to peer across a forty-acre parcel of adjoining land The court determined that "where a marijuana patch is visible from an adjoining field, the officer's observations do not constitute a search." *Id* at 639

More to the point with respect to the issues in this case, the court in *Peck* also stated: "This is *not* a case where the police used binoculars to peer into a house, apartment or other enclosed building *Such an intrusion would plainly violate a person's expectation of privacy* " *Id* at 639 (emphasis supplied).

The defendant had the right to assume that the his private patio, immediately adjacent to a sliding glass window, was private and that he would be free of unwanted and unauthorized observation from that position. It was the curtilage of his house, and he was entitled to the protection of the Fourth Amendment with respect to any search and seizure that commenced from that location

B. The State Does Not Explain How Rousting Someone From Their Residence After That Person Has Initially Refused to Talk to the Police, Constitutes a Consensual Interview

In its Answering Brief, the State contends that when Perkins came to the sliding glass door of his condominium, his opening of the door and subsequent conversation with the officer was "consensual " In making this argument, the State ignores several important factors that make it clear that the conversation was *not* consensual and that any evidence obtained from the non-consensual questioning of the defendant should be suppressed.

1. The Trial Court Correctly Found that Police Officer Did Not Have Reasonable Suspicion to Detain the Defendant

The trial court found that the information that the security guard, Muller, had given to the police officer "did not amount to reasonable suspicion to detain defendant." Opinion, ¶ 3. Accordingly, there was not sufficient evidence to support a "Level 2" interrogation until *after* Perkin's had opened his door and the police officer then smelled alcohol on his breath.

The facts in this case are consistent with the court's finding of no reasonable suspicion: although the security guard testified that individual he encountered seemed slow to respond and appeared to be slurring his speech, he also testified that he was not close enough to him to detect if he had a ı odor of alcohol. R45:11-13. The evidence was also that the encounter took place at approximately 3 a.m., so that the physical mannerisms observed by the security guard could also have been attributable to the fact that the person he was observing was very tired.

This court should not substitute its judgment of credibility of testimony or witnesses for that of the trial judge, who actually heard all of the testimony. The factual findings of a trial court may only be overturned if they are clearly erroneous. *State v. Pena,* 869 P.2d 932, 935-6 (Utah 1994). Here, the trial court examined the legal requirement that a "tip" must be sufficiently reliable to support the conclusion that a crime has been committed against the security officer's failure to detect any odor of alcohol on the defendant's breath and correctly concluded that the facts reported by the

security guard to the officer did not support a finding of "reasonable suspicion" that a crime had been committed.

The State's argument that "even if the encounter could be construed as a detention, it was justified by at least reasonable suspicion" is contrary to the factual finding of the trial court and cannot be sustained.

2. The Trial Court Erred When It Found that the Questioning of the Defendant Was Consensual

On the other hand, the application of factual findings to the question of whether a particular search violated the Fourth Amendment is a mixed question of fact and law that must be reviewed non-deferentially, for "correctness." *State v. Pena*, 869 P.2d at 939. On the issue of coercion, the facts are not in dispute: Perkins initially refused to talk to the officer and ducked down behind a piece of furniture, only opening the door after the officer continued knocking and issued the authoritative statement: "Come here. I want to talk to you." Perkins submits that the officer's insistence that he come to the window and speak with him, after he had initially indicated that he did not wish to do so, was coercive as a matter of law.

The cases on which the State relies – *United States v. Cormier*, 200 F.3d 1103, 1109 (9th Cir. 2000); *Scott v. State*, 782 A.2d 862, 875-6 (Md. 2001) and *Gompf v. State*, 120 P.3d 980, 986-7 (Wyo. 2005) – all expressly find that the officers did not brandish weapons, raise their voices, speak in an authoritative tone or command residents to let them in and therefore do not help the State's case. In *Cormier*, for example, the Ninth

Circuit expressly found that the police officer who knocked at Cormier's hotel room door did not even identify herself as a police officer, nor did she ever "compel Cormier to open the door under the badge of authority." In *Gomph,* the resident of the house "answered the door and invited the officers inside." 120 P.3d at 983. Here, Perkins did not open the door and invite the officer inside; he tried to hide behind a piece of furniture so as to avoid talking to the officer. Here, the police officer *did* compel Perkins to open the door with his authoritative "come here."

The State makes no effort to distinguish the case of *State v. Alvey*, 2007 UT App. 161, ¶¶4 and 5, on which Perkins relied for the proposition that in Utah, when a police officer uses authoritative language to instruct someone to move from one position to another, that constitutes a "level 2" detention and not a consensual search. Although the State asks the Court to adopt the rationale of a Vermont case, *State v. Ford*, 2007 VT 107, 182 Vt. 421, 940 A.2d 687, the State offers no argument as to why this case, if it is inconsistent with applicable Utah authority, should become the new rule.

In fact, however, the principles articulated in *State v. Ford* are not contrary to Utah law. The question of whether the officer's initial conversation with the defendants was coercive was not at issue in *Ford.* Although the factual setting is temptingly similar to the one in this case – a tip regarding illegal marijuana usage, together with the identification of and location of an automobile (a Subaru) and even "footsteps in the snow" to the front door of an apartment – similarity of facts does not mean similarity of issues.

In *Ford,* there was nothing to indicate that the defendants' initial opening of the apartment door when the police knocked was anything other than consensual The issue in *Ford* was rather whether the officer exceeded constitutionally permissible behavior when he asked the people inside the apartment to step outside, and then further when he searched them after observing that one of the people was wearing a small knife The appellate court found that the defendants had no constitutional right to be questioned indoors rather than outdoors, and that the officer was entitled to search for additional weapons once he had identified the existence of a knife

None of those factors are present in this case Here, the issue is not what happened after the door was opened but rather whether the opening of the door in the first instance was coerced. Specifically, the court in *Ford* found that the officer had a reasonable basis for suspecting that the inhabitants of the apartment had committed a crime *before* he knocked on the door, whereas in this case the trial court found that the officer did not have a reasonable basis to detain the defendant until *after* the man cowering behind the bed (who turned out to be Perkins) was compelled to come to the door by the officer's authoritative "come here."

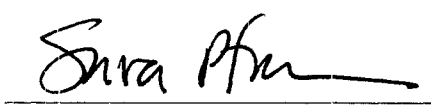
The police officer's insistence upon questioning Perkins, without reasonable suspicion to detain him and after he had clearly indicated by his conduct that he did not wish to speak with the officer, violated Perkin's right to be free from unreasonable search and seizure The Fourth Amendment requires that any evidence obtained from that

questioning – which was, in fact, the only evidence to support the charges of driving under the influence in this case – must be suppressed.

CONCLUSION

For all the reasons set forth above and in his Opening Brief, Perkins submits that his questioning by a police officer who had invaded his private rear patio and then authoritatively directed him to "come here" and answer questions after he had indicated he did not wish to talk, violated his constitutional rights. The evidence obtained through this illegal questioning must be suppressed and the verdict of driving under the influence that was obtained only through the use of such illegal evidence, vacated.

Respectfully submitted September 21, 2009



SARA PFROMMER

Attorney for Travis James Perkins

CERTIFICATE OF SERVICE BY U.S. MAIL

I hereby certify that on this 21st day of September, 2009, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT TRAVIS PERKINS was placed in the United States Mail, postage prepaid, to the following:

KENNETH A. BRONSTON

Assistant Attorney General

MARK L. SHURTLEFF

Utah Attorney General

160 East 300 South, 6th Floor

Salt Lake City, UT 84114-0854

DATED this 21rd day of September, 2009.